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Jansen, René

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# Explaining the methods for taking evidence abroad within the EU and some first observations on the proposal for the Evidence Regulation (recast)

René Jansen\*

## Abstract

*There are various ways to take evidence abroad during civil litigation within the EU. A court can ask for judicial assistance under the Evidence Regulation or for permission to take the evidence itself. Furthermore, parties can ask the court where the evidence is located to grant a provisional measure on the basis of Article 35 of the Brussels I-bis Regulation. A court may also order the taking of evidence abroad pursuant to its internal law, if it has subject-matter jurisdiction. The relationship between these different methods has caused uncertainty and is therefore explained within this article. Furthermore, attention is paid to the Commission's proposal for the Evidence Regulation (recast) and the extent to which it solves issues that have been identified by scholars and practitioners regarding the operation of the present regulation.*

## 1. Introduction

In this article I will critically appraise the EU Commission's legislative proposal<sup>1</sup> to revise Regulation 1206/2001/EC (hereinafter: 'Evidence Regulation').<sup>2</sup> On top of that, this article explains which role the present Evidence Regulation plays in the taking of evidence abroad within the EU during civil litigation. Alongside the use of this Regulation, parties can also request the court of the state where the evidence is located to grant provisional measures on the basis of Article 35 of the Brussels I-bis Regulation.<sup>3</sup> Furthermore, the Court of Justice of the European Union (hereinafter: 'CJEU') has clarified in the cases of *Lippens/Kortekaas*<sup>4</sup> and *ProRail/Xpedys*<sup>5</sup> that the courts of the EU Member States may also order the taking of evidence abroad on the basis of the internal laws of their states (*lex fori*).

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\* R. (René) Jansen LL.M. is a PhD Candidate at the Private and Business Law Department of Tilburg University.

1 See Proposal COM(2018) 378 final of 31 May 2018.

2 OJ 2001, L 174/1.

3 OJ 2012, L 351/1. See for two previous discussions, A. Rushworth, 'Demarcating the Boundary Between the Brussels I Regulation and the Evidence Regulation', *Lloyd's Maritime and Commercial Law Quarterly* 2009, pp. 196-209; J. von Hein, 'Drawing the line between Brussels I and the evidence regulation', *European Legal Forum* 2008, pp. I-34-I-36.

4 CJEU 6 September 2012, C-170/11, ECLI:EU:C:2012:540, *NIPR* 2012, 466 (*Lippens and others/Kortekaas and others*).

5 CJEU 21 February 2013, C-332/11, ECLI:EU:C:2013:87, *NIPR* 2013, 155 (*ProRail/Xpedys and others*).

Considering that many believe – including the EU Commission<sup>6</sup> – that the judgments in *Lippens* and *ProRail* have caused legal uncertainty,<sup>7</sup> in the next section I will first explain in which ways evidence can be taken abroad during civil litigation within the EU. Whilst doing so, I will elaborate on the reasons why courts or parties may prefer one method instead of another. I will also explain when courts of the EU Member States may order the taking of evidence abroad on the basis of their internal laws. In the third section I describe the procedures for taking evidence abroad under the Evidence Regulation. Hereinafter, I will indicate whether parties can request a court of another EU Member State to grant provisional measures for the taking of evidence on the basis of Article 35 of the Brussels I-*bis* Regulation. Then, I will elaborate on the extent to which the Commission has proposed solutions to issues that have been identified by scholars and practitioners as regards the operation of the present Regulation in its proposal for the Evidence Regulation (recast).

2. Different methods for the taking of evidence abroad within the EU

The ways in which the claimant can obtain evidence from another EU Member State are illustrated by the following diagram.

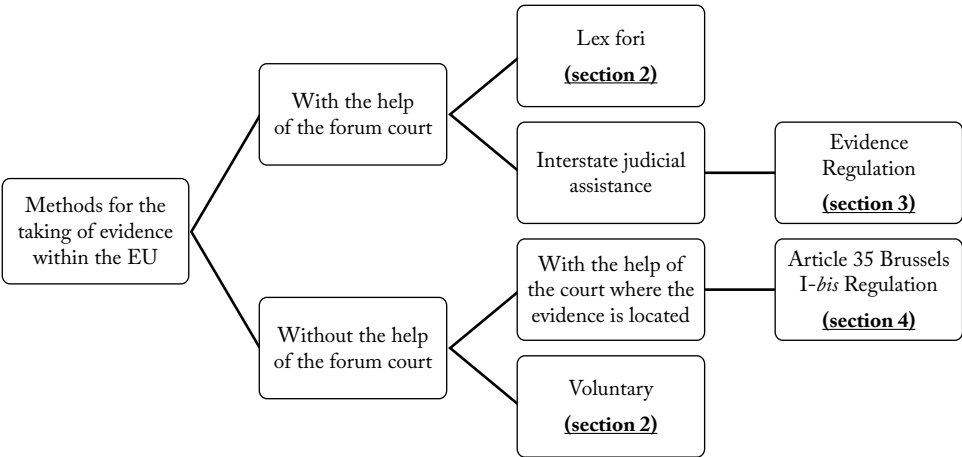


Fig. 1: The different methods for the taking of evidence within the EU (together with an indication of which section of this article discusses a particular method)

6 Working document SWD(2018) 285 final of 31 May 2018, Annex 9, p. 31.  
7 Cf. C. Thole, ‘Kein abschließender Charakter der Europäischen Beweisaufnahmeverordnung’, *IPRax* 2014, p. 255, at p. 257; O.L. Knöfel, ‘Freier Beweistransfer oder “Exklusivität” der Rechtshilfe in Zivilsachen?’, *IPRax* 2013, p. 231, at pp. 232-233. For a critical appraisal of the relationship between the different EU Regulations on civil procedure, see T. Kruger, ‘The Disorderly Infiltration of EU Law in Civil Procedure’, *NILR* 2016, pp. 1-22.

Assuming that the persons who possess the desired evidence do not provide it voluntarily,<sup>8</sup> the claimant needs a court order<sup>9</sup> which compels the person from whom evidence is sought to provide that evidence. Thereby a distinction can be made between the taking of evidence *from* and *within* another state.<sup>10</sup> Considering that international law forbids a state – in the absence of a permissive rule that dictates otherwise – to use force outside its own territory,<sup>11</sup> foreign judicial assistance is required when evidence has to be obtained within another state.<sup>12</sup> This, however, solely applies to the situation in which the evidence must be taken *by means of compulsion*, or when the evidence must be taken *at a location which is not accessible to the general public*. Then, the claimant must ask the forum court to request the appropriate foreign court for judicial assistance in the taking of evidence (see section 3). The claimant can also ask the court on whose territory the evidence must be taken for assistance (see section 4).<sup>13</sup>

This simultaneously explains why there is in principle no need to ask a foreign court for assistance in the taking of evidence, when the claimant wants to obtain (documentary) evidence from his opposing party during a civil procedure which has *already commenced*. Once a court – that has been seized – concludes that it has subject-matter jurisdiction, the taking of evidence takes place on the basis of the *lex fori*. Then, the court can order a party to disclose information – that is in his possession – from abroad, such as documents. Furthermore, when the requested party does not comply with this court order he can be procedurally sanctioned by the court,<sup>14</sup> which could – *inter alia* – mean that facts that are disadvantageous to his legal position are considered as proven by the forum court.<sup>15</sup> Accordingly, in those situations there is no actual need for either the court or the claimant to request for foreign judicial assistance.

8 Cf. A. Nuyts, 'Le règlement communautaire sur l'obtention des preuves: un instrument exclusif?', *Revue critique de droit international privé* 2007, p. 53, at pp. 56-57.

9 When the person from whom the evidence is sought knows that a court will compel him to provide the evidence upon the request of the claimant, it will make this method quasi-voluntary, see N. Meyer-Fabre, 'L'obtention des preuves à l'étranger', in: *Communication de Mme Nathalie Meyer Fabre* (Droit international privé année 2002-2004), Paris: Pedone 2005, p. 214.

10 J. Daoudi, *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozess*, Berlin: Duncker & Humblot 2000, p. 15. In sect. 3.2.3 I will further explain why it is important to make this distinction.

11 Y. Le Berre and É. Patat, 'The Gathering of Evidence in France in Support of Foreign Proceedings on the Merits', *International Business Law Journal* 2004, p. 53, at p. 67. For a discussion, see C. Ryngaert, *Jurisdiction in International Law*, Oxford: Oxford University Press 2015, in particular p. 31.

12 Rushworth 2009 (*supra* n. 3), p. 199; Nuyts 2007 (*supra* n. 8), p. 56.

13 Cf. HR 8 June 2012, ECLI:NL:HR:2012:BV8510, *NIPR* 2012, 358, *NJ* 2013/286 (*ADIB/Fortis Bank*), in which case the Dutch Supreme Court held that the provision on disclosure (Art. 843a Dutch Code of Civil Procedure) may also be used for the taking of evidence in light of foreign civil proceedings. However, the court must have jurisdiction to do so. See H.B. Krans, case note on HR 8 June 2012, ECLI:NL:HR:2012:BV8510, *NJ* 2013/286 (*ADIB/Fortis Bank*), para. 9. For the courts of the EU Member States this depends – *inter alia* – on the rules of *lis pendens* under the Brussels I-bis Regulation. See for an elaborate discussion in relation to the jurisdiction of the Dutch courts to grant such measures, R. Jansen, 'Een (voorlopig) getuigenverhoor van een in Nederland verblijvend persoon die hier niet woonachtig is ... en waarom dit mogelijk niet werkt', *Tijdschrift voor de Procespraktijk* 2019, p. 15, at pp. 17-20.

14 Rushworth 2009 (*supra* n. 3), p. 199. This order is called an *in personam* injunction. See *ibid.*, pp. 206-207.

15 Le Berre and Pataut 2004 (*supra* n. 11), p. 60.

In the past, such orders that were made by US courts regarding foreign documentary evidence caused international turmoil, especially among the Continental European states. Nevertheless, most scholars underline the legitimacy of such court-ordered injunctions against litigants for the taking of (documentary) evidence abroad, whilst simultaneously pointing to the fact that the courts of some EU Member States grant such injunctions as well.<sup>16</sup> Injunctions cannot be used, however, with regard to third parties who are domiciled abroad<sup>17</sup> and who do not possess assets on the territory of the forum state.<sup>18</sup>

### 3. Taking evidence abroad under the Evidence Regulation

#### 3.1 *The reasons why the Regulation was adopted*

The Evidence Regulation aimed to improve judicial cooperation between the EU Member States with respect to cross-border evidentiary issues. Prior to its adoption, only 11 (out of the then 15) Member States were a contracting state to the Hague Evidence Convention 1970.<sup>19</sup> Today, all Member States (except Denmark) take note of the rules of the Regulation regarding

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16 Cf. Daoudi 2000 (*supra* n. 10), pp. 78-80; T.H. Groud, *La preuve en droit international privé*, Aix-en-Provence: Presses universitaires d'Aix-Marseille 2000, pp. 262 and 276; A. Bareiss, *Pflichtenkollisionen im transnationalen Beweisverkehr*, Tübingen: Mohr Siebeck 2014, pp. 45-46. For three examples, see the Dutch District Court of Haarlem of 10 October 2012, ECLI:NL:RBHAA:2012:BX9895 (*Windt&Meijer q.q./Qwest Communications International Incorporated et al.*), paras. 7.5-7.7, in which the court ordered an American defendant on the basis of the *lex fori* to produce documents that had been earlier shared between the parties during a US discovery procedure, irrespective of a US protective order; Belgian Supreme Court of 25 April 2013, N° C.11.0103.F/33 (*Fortis Luxembourg Vie/G.R.*), in which the Supreme Court ruled that the Evidence Regulation does not prevent a court from ordering a litigant from Luxembourg to produce a document on the basis of the *lex fori*, under the threat of imposing a fine in case of non-compliance; English Court of Appeal of 22 October 2013, EWCA Civ 1234 (*Secretary of State for Health/Servier Laboratories Ltd and National Grid Electricity Transmission Plc/ABB Limited*), in which the appellate court ordered the French defendants to disclose a document and provide information on the basis of the *lex fori*, irrespective of the French Blocking Statute.

17 This is due to the principles of sovereignty and territoriality. Some scholars wonder whether such orders may also be made regarding third parties who reside abroad or are only temporarily present within the court's jurisdiction. In favour: See A. Galič, 'Open issues concerning the non-mandatory character of the Cross-Border Taking of Evidence Regulation', *ERA forum* 2017, p. 220, against: Thole 2014 (*supra* n. 7), p. 258, depending on the circumstances: Jansen 2019 (*supra* n. 13), pp. 18-20.

18 If third parties do possess such assets, the court can grant the injunction. At the same time it is assumed, however, that foreign third parties often ignore such orders. See Galič 2017 (*supra* n. 17), p. 220 and V. Rijavec and A. Galič, 'Assessment of Evidence Regulation', in: V. Rijavec, T. Keresteš and T. Ivanc (eds.), *Dimensions of evidence in European civil procedure*, Alphen aan den Rijn: Wolters Kluwer 2016, p. 351, at p. 354. This means that the beneficiary of the court order must apply for the recognition and enforcement of the preliminary judgment at the authorities of the state in which this third party is domiciled, which can take a great deal of time. See the comments by Huet in Meyer-Fabre 2005 (*supra* n. 9), p. 225 and Art. 2(a) of the Brussels I-bis Regulation.

19 See recital 6 of the Regulation and the Convention on the taking of evidence abroad in civil or commercial matters, 18 March 1970, 847 UNTS 241 ('Hague Evidence Convention').

the taking of evidence in another Member State during civil litigation.<sup>20</sup> Furthermore, the Regulation was adopted in order to accelerate and simplify the evidence-taking procedures via – *inter alia*<sup>21</sup> – the system of direct communications between the courts of the Member States.<sup>22</sup> Accordingly, the requesting court must send the request directly to the requested court, and the latter must return the documents that result from the execution of the request directly to the requesting court. Hence, the so-called central bodies that the Member States have created have an information-providing and a problem-solving task,<sup>23</sup> and may only serve as a channel of transmission in exceptional circumstances.<sup>24</sup>

### 3.2 *The indirect and the direct method*

The Evidence Regulation offers the forum court either the possibility of requesting a court of another Member State to take the evidence on its behalf, or asking the central body (or another competent authority) of the state in whose territory the evidence is located for permission to take the evidence directly. The first is known as the *indirect method*<sup>25</sup> or *active judicial assistance*,<sup>26</sup> whereas the latter is referred to as the *direct method* or *passive judicial assistance*.<sup>27</sup> The direct method therefore does not qualify as direct evidence-gathering on the basis of the *lex fori* – as discussed in the second section of this article – since it depends on the prior approval of the foreign competent body.

There is no hierarchy between the indirect and direct method, based on their equal positioning in Article 1(1) of the Regulation.<sup>28</sup> The operation of both methods is illustrated in the following diagram.

20 Cf. Art. 21(1): within the EU the Evidence Regulation has replaced the Hague Evidence Convention as regards the taking of evidence in another EU Member State in civil and commercial matters.

21 Cf. Nuyts 2007 (*supra* n. 8), p. 58, who also describes the possibility of direct evidence-taking, the use of prescribed forms and the adoption of fixed time limits in this respect.

22 This system was derived from the Service Regulation, and is based on the principle of mutual trust between the Member States. See recital 7 of the German proposal (OJ 2000, C 314/1) and Advocate General Jääskinen, opinion in C-332/11, *ProRail*, para. 48. The system of transmission via the central authorities, that was used under the Hague Evidence Convention, was considered to be too cumbersome. See M. Freudenthal, *Schets van het Europees civiel procesrecht*, Deventer: Kluwer 2013, p. 162.

23 Art. 3.

24 E.g. when the requested court is unknown or unable to perform its task. See Freudenthal 2013 (*supra* n. 22), p. 169, who mentions the situation where a fire has destroyed the courthouse of the requested court or when a natural disaster or strike occurs.

25 Advocate General Jääskinen, opinion in C-170/11, *Lippens*, para. 32.

26 Rijavec and Galič 2016 (*supra* n. 18), p. 355; Opinion of the European Economic and Social Committee (hereinafter: 'EESC') on the 'Initiative of the Federal Republic of Germany with a view to adopting a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters', OJ 2001, C 139/04.

27 Rijavec and Galič 2016 (*supra* n. 18), p. 371.

28 Freudenthal 2013 (*supra* n. 22), p. 166; B.J. van het Kaar, *IPR-bewijsrecht en bewijsverkrijging*, Deventer: Kluwer 2008, p. 171.

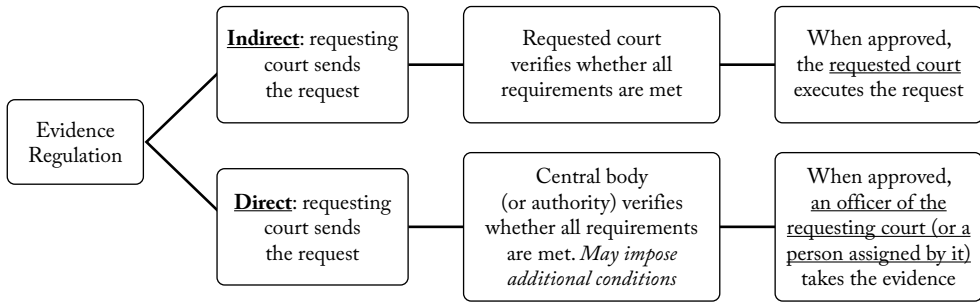


Fig. 2: The indirect and direct method under the Evidence Regulation

Under the Evidence Convention the Contracting States can exclude the operation of the direct evidence-taking method on their territory.<sup>29</sup> The Evidence Regulation does not provide this possibility. Consequently, the Evidence Regulation has had an impact on the domestic laws of the Member States, because these states are obliged to enable the courts of other Member States to take evidence directly on their territory.<sup>30</sup> Nevertheless, the internal law of the state of the requesting court, the forum state, ultimately decides whether that state's court can use both methods.<sup>31</sup>

Similar to the Evidence Convention, however, the Regulation refrains from defining its terms, such as *evidence*,<sup>32</sup> *court*, *commenced or contemplated* and *judicial proceedings*. This has caused several practical problems.<sup>33</sup> Some scholars therefore argue that the terms of the Evidence Regulation should be interpreted broadly and autonomously, seeing that the text of the Regulation does not exclude certain types of evidence, cases, or courts from its scope.<sup>34</sup> Others argue, nonetheless, that arbitral tribunals do not qualify as courts and that therefore no evidence may be obtained under the Regulation in light of arbitral proceedings.<sup>35</sup>

29 See Art. 33 of the Evidence Convention.

30 Van het Kaar 2008 (*supra* n. 28), pp. 170 and 183.

31 Art. 1(1).

32 Arts. 4(1) and 18(2) mention some examples of evidence-taking. Cf. para. 8 of the Practical Guide, [http://ec.europa.eu/civiljustice/evidence/evidence\\_ec\\_guide\\_en.pdf](http://ec.europa.eu/civiljustice/evidence/evidence_ec_guide_en.pdf).

33 Report COM(2007) 769 final of 5 December 2007, para. 2.9.

34 Cf. Freudenthal 2013 (*supra* n. 22), p. 164; C. Besso, 'Cooperation in the Taking of Evidence; The European Attitude', *International Journal of Procedural Law* 2012, p. 68, at p. 74; J.D. McClean, *International co-operation in civil and criminal matters*, Oxford: Oxford University Press 2012, p. 104. See also CJEU 17 February 2011, C-283/09, ECLI:EU:C:2011:85, *NIPR* 2011, 220 (*Weryński v. Mediatel*), para. 58 (regarding an interpretation of the concept of costs) and Advocate General Kokott, opinion in Case C-175/06, *Tedesco*, para. 42.

35 Cf. Practical Guide (*supra* n. 32), para. 9. However, these tribunals can ask a domestic court to send the request on their behalf, if this is allowed under the internal laws of their states. See Rijavec and Galič 2016 (*supra* n. 18), p. 358; O. Knöfel, 'Judicial assistance in the Taking of Evidence Abroad in Aid of Arbitration: a German Perspective', *Journal of Private International Law* (2) 2009, p. 281, at pp. 284-286.

### 3.2.1 The indirect method: requirements, formalities and limited grounds for refusal

The indirect method comes down to the system of letters of request, that is traditionally used for the taking of evidence abroad during civil and commercial procedures.<sup>36</sup> However, apart from the direct channel of transmission that is used under the Regulation, its system of letters of request is more detailed than that of the Evidence Convention. It introduces, for instance, the use of prescribed forms as well as time limits. Furthermore, its grounds for refusal are more limited compared to the Evidence Convention.

Under the Regulation's indirect method a court must send its request by making use of the prescribed form A.<sup>37</sup> The requested court of the other Member State has to send an acknowledgement of receipt within seven days, by using form B.<sup>38</sup> It also checks whether all requirements of Articles 4-6 are met. If the requested court holds that the request is non-compliant with Articles 4-6, it must notify the requesting court of this within 30 days by using form C.<sup>39</sup> Article 4 in that respect lists several requirements as to the contents,<sup>40</sup> whilst Articles 5 and 6 list the formal requirements regarding language and the way in which the request must be sent. After having been notified, the requesting court must send an improved request within 30 days.<sup>41</sup>

If the request meets all of the requirements the requested court must execute the request within 90 days,<sup>42</sup> unless a ground for refusal applies.<sup>43</sup> These grounds for refusal are more limited compared to the Evidence Convention. Moreover, they can only be applied in a limited number of circumstances,<sup>44</sup> in light of the principles of mutual recognition and mutual trust between the EU Member States.<sup>45</sup> Accordingly, on the basis of Article 14 the execution of a request can first be (partly)<sup>46</sup> refused if the person from whom the evidence is sought invokes a privilege or a right to refuse to give evidence under the laws of the state of the requesting<sup>47</sup> or

36 Cf. Nuyts 2007 (*supra* n. 8), p. 58.

37 Art. 2(1). The Annex to the Regulation contains several prescribed forms.

38 Art. 7. Cf. Working document SWD(2018) 285 final of 31 May 2018, para. 2.3.2: this time limit is rarely complied with in practice.

39 Art. 8(1).

40 The requesting court must, *inter alia*, provide information about itself and the requested court (if appropriate), the parties to the proceedings and their representatives, the nature, subject-matter and facts of the case and the taking of evidence that has to be performed.

41 See Art. 14(2)(c). If the request then complies with the Evidence Regulation, the requested court must execute the request within 90 days upon receiving the improved document, see Art. 9(1).

42 See Art. 10(1).

43 Art. 9(1). When a ground for refusal applies, the requested court must notify the requesting court within 60 days of the receipt of the request by using form H (see Art. 14(4)).

44 Cf. Recital 11 and the *Weryński* case, para. 53 (*supra* n. 34).

45 Freudenthal 2013 (*supra* n. 22), p. 176.

46 The requested court must – in light of improving judicial cooperation between the EU Member States – first examine whether the request can be altered in such a way that it can be executed nonetheless, see Advocate General Kokott, opinion in Case C-175/06, *Tedesco*, para. 111.

47 Provided that it has been specified in the request, or the requesting court confirms the existence of this privilege or right upon the request of the requested court, see Art. 14(1)(b). Even though Art. 14(1) speaks of 'the hearing of a person', this ground for refusal also applies when documentary evidence is sought. See



requested court. Second, a requested court can refuse the execution of the request if it does not fall within the scope of the Regulation or within its judiciary functions. Third, the requested court can refuse to execute the request if the requesting court does not remedy any identified deficiencies within 30 days after it was asked to do so by the requested court. Accordingly, compared to the Evidence Convention the courts of the Member States cannot refuse the execution of a request under the Regulation for sovereignty or security reasons.<sup>48</sup>

When the requested court has executed the request, it promptly sends the evidence obtained to the requesting court by using form H.<sup>49</sup>

### 3.2.2 The direct method: the need for prior approval and the cooperation of the person concerned

When the requesting court prefers that the evidence is taken by one of its judicial officers or a court-appointed expert *within* another Member State, it must request the central body (or another competent authority) of that state for permission pursuant to Article 1(1)(b) and Article 17. This request for direct evidence-taking must meet the requirements of Articles 4-6, and the requesting court must use form I for requesting the required permission.<sup>50</sup> Within 30 days upon receiving its request, the requested central body (or authority) must respond by using form J. When it approves the execution of the request, which takes place in line with the procedural law that is used by the forum court, it may still impose certain conditions that have to be taken into account during the execution.<sup>51</sup> It can, for instance, require that a judicial officer of its court is present while the evidence is taken. The possibility of such imposed conditions and the fact that no means of compulsion can be used<sup>52</sup> are presumably the reason why the direct method is rarely used in practice.<sup>53</sup>

### 3.2.3 The Regulation must be mainly seen as an optional tool

In the aftermath of the US Supreme Court's judgment in *Aérospatiale* – in which this Court held that US courts may also order a foreign defendant to disclose documentary evidence from abroad without using the Evidence Convention<sup>54</sup> – the court in Luxembourg was asked to clarify the mandatory nature of the Evidence Regulation. After the ECJ briefly touched upon this

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B. Hess et al., *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law*, Luxembourg: Publications Office of the European Union 2017, para. 263.

<sup>48</sup> See Art. 12(b) of the Evidence Convention.

<sup>49</sup> Art. 16.

<sup>50</sup> Art. 17(1).

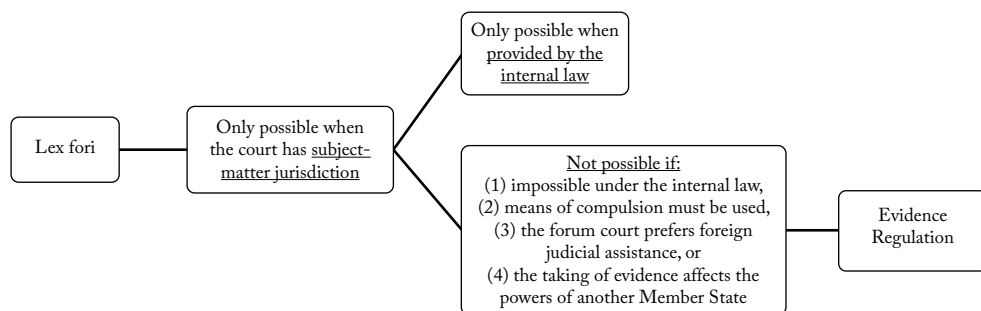
<sup>51</sup> Art. 17(4). Cf. Nuyts 2007 (*supra* n. 8), p. 59: these conditions are frequently imposed.

<sup>52</sup> Cf. Art. 17(2): the evidence is taken voluntarily.

<sup>53</sup> See Report COM(2007) 769 final of 5 December 2007, para. 2.7. Contra: Freudenthal 2013 (*supra* n. 22), p. 169, who refers to a growing use.

<sup>54</sup> *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 US 522, 542-543 (1987).

in *St. Paul Dairy*,<sup>55</sup> the CJEU held in *Lippens* that the Evidence Regulation is not mandatory for forum courts that want to take evidence *from* another Member State.<sup>56</sup> It thereby noted that a court may apply means of compulsion on the basis of its *lex fori* when this person over whom it has jurisdiction does not comply with the order.<sup>57</sup> In *ProRail* the CJEU confirmed its judgment in *Lippens*, and even noted that courts that have subject-matter jurisdiction may order the taking of expert evidence *within* another Member State *without* asking prior permission for this. Hence, both of these judgments clearly position the Evidence Regulation as an optional tool that can be used by courts that want to take evidence from or within another Member State.



**Fig. 3:** The relationship between subject-matter jurisdiction and the possibilities for taking evidence abroad

There is, however, one exception to this. The CJEU held in *ProRail* that the Evidence Regulation does become mandatory when the taking of evidence on the basis of the *lex fori* affects the powers of another Member State. It thereby mentioned the situation in which evidence must be taken within another Member State from a location that is not accessible to the general public.<sup>58</sup> Since then, it has not further elaborated on the meaning of this phrase. Some scholars claim that it should be understood as prohibiting courts from making discovery orders when documents are protected against disclosure under foreign law.<sup>59</sup> It seems, however, that forum courts are entitled to order such discovery under international law, unless it infringes upon supranational norms. One can think of the situation in which a court order would violate an individual's human right to privacy, or allows the use of force by officers of the state of the

<sup>55</sup> See sect. 4 of this article.

<sup>56</sup> Scholars had already agreed upon the legality of such orders prior to *Lippens*. E.g. A. Nuyts, 'Le règlement (CE) n° 1206/2001 sur l'obtention de preuves et sa première interprétation communautaire par l'arrêt *St Paul Dairy*', in: G. de Laval and Candela Sorriano (eds.), *Espace judiciaire européen*, Brussels: Larcier 2007, p. 289, at pp. 296-297; Meyer-Fabre 2005 (*supra* n. 9), p. 212.

<sup>57</sup> Such an order must, however, be in line with principles of EU law. This means that the order must – *inter alia* – be proportionate. See the *Lippens* case, para. 38 (*supra* n. 4) and Advocate General Jääskinen, opinion in C-170/11, *Lippens*, para. 55.

<sup>58</sup> *ProRail* case, para. 47 (*supra* n. 5).

<sup>59</sup> G. Cuniberti, 'L'expertise judiciaire en droit judiciaire européen', *Revue critique de droit international privé* (3) 2015, p. 519, at p. 538; A. Nuyts, 'Les arrêts Lippens et ProRail: retour sur l'exclusivité de la réglementation européenne de collecte des preuves', *Journal des tribunaux* (29) 2014, p. 557, at p. 559.

requesting court on the territory of another Member State.<sup>60</sup> In such cases, the Evidence Regulation must be used instead.<sup>61</sup>

#### 4. Provisional evidence-taking under Article 35 of the Brussels I-bis Regulation

A different question is whether EU law authorizes the courts of the Member States – that have no subject-matter jurisdiction – to assist applicants in the taking of evidence, in light of civil lawsuits that (will) take place at the court of another Member State. Scholars have described this as ‘evidentiary forum shopping’ or ‘evidence importing’,<sup>62</sup> while I refer to it as *provisional evidence-taking*. In essence, it relates to the relationship between, on the one hand, the *lex fori* and the Evidence Regulation and, on the other, Article 35 of the Brussels I-bis Regulation. The ECJ has discussed the limits of provisional evidence-taking within the EU in several judgments, most recently in *St. Paul Dairy*.<sup>63</sup>

The ECJ has held in numerous cases that only courts that have subject-matter jurisdiction, on the basis of Article 4 or Articles 7-26 of the Brussels I-bis Regulation, have an unconditional authority to order evidence-taking measures. Consequently, courts that have no such jurisdiction may only grant *provisional* measures on the basis of Article 35 of the Brussels I-bis Regulation, for which certain conditions must be met.



Fig. 4: Taking evidence in another Member State under Article 35 Brussels I-bis Regulation

First of all, the ECJ held in the cases of *Denilauler* and *Reichert II* that provisional measures safeguard rights that the applicant tries to recognize in the main proceedings. It also held in these cases that a court without subject-matter jurisdiction must ensure the provisional or protective character of the granted measure.<sup>64</sup> Second, the ECJ held in *Van Uden* that the subject-matter of such measures must have a real connecting link with the territorial jurisdiction

60 Thole 2014 (*supra* n. 7), p. 257.

61 Knöfel 2013 (*supra* n. 7), p. 232.

62 See e.g. J. von Hein, ‘EG-BewVo’, in: T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht. Kommentar*, Cologne: Otto Schmidt 2014, p. 891, at p. 1013; O.L. Knöfel, ‘Grenzüberschreitende Beweissammlung durch Private’, in: R. Geimer et al. (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta*, Vienna: LexisNexis 2012, p. 333, at p. 339; B. Hess & A. Müller, ‘Die Verordnung 1206/01/EG zur Beweisaufnahme im Ausland’, *Zeitschrift für Zivilprozess international* (6) 2001, p. 149, at p. 157. US courts are authorized to provide such assistance on the basis of Title 28 USC § 1782, see R.P. Alford, ‘Ancillary Discovery to Prove Denial of Justice’, *Virginia Journal of International Law* (53) 2012, p. 127, at pp. 151-153.

63 The ECJ reasoned in the *St. Paul Dairy* case that enabling a court without subject-matter jurisdiction to grant evidence-taking measures can in some situations lead to a circumvention of the protective rules of the Evidence Regulation. ECJ 29 April 2005, C-104/03, *ECR* 2005, p. I-03481, *NIPR* 2005, 153, para. 23 (*St. Paul Dairy v. Unibel Exser*).

64 ECJ 21 May 1980, C-125/79, *ECR* 1980, p. 1553, para. 15 (*Bernard Denilauler v. SNC Couchet Frères*); ECJ 26 March 1992, C-261/90, *ECR* 1992, p. I-02149, *NIPR* 1995, 393, para. 34 (*Reichert and Kockler v. Dresdner Bank AG*).

of the rendering court,<sup>65</sup> which means that the evidence must be located on the territory of its state.<sup>66</sup> Third, the ECJ held in *St. Paul Dairy* that measures which serve to allow the applicant to assess his chances of success in future proceedings do not qualify as provisional under Article 35.<sup>67</sup>

At first sight, this leads to the conclusion that courts without subject-matter jurisdiction may only grant measures that preserve the evidence. Hence, a Dutch court could not order the preliminary hearing of a witness on the basis of Article 186 of the Dutch Code of Civil Procedure in *St. Paul Dairy*, because it would enable an applicant to obtain a full witness testimony for assessing his chances in future lawsuits. Nonetheless, the ECJ did note in *St. Paul Dairy* that a court may grant a provisional measure that is not merely protective, when there is a 'justification other than the interest of the applicant in deciding whether to bring proceedings on the substance'.<sup>68</sup> Considering that the taking of evidence on the basis of the Evidence Regulation can take around 30 or 90 days, this seems to suggest that courts are allowed to grant provisional evidence-taking measures when there is a risk that the evidence is otherwise lost due to a short passing of time.<sup>69</sup> The applicant's interest in obtaining the evidence in good time, in light of its right of access to justice, could then serve as the ground for justification on the basis of which a court could order the evidence-taking.<sup>70</sup> In light of the ECJ's judgments in *Denilauler* and *Reichert II*, I would thereby advise that such evidence-taking takes place outside the presence

65 ECJ 17 November 1998, C-391/95, ECR 1998, p. I-07091, NIPR 1999, 77, para. 40 (*Van Uden v. Deco-Line*)

66 M. Pertegás Sender and Thomas Garber, 'Article 35', in: U. Magnus and P. Mankowski, *European Commentaries on Private International Law. Commentary. Brussels Ibis Regulation*, Cologne: Otto Schmidt 2016, pp. 802-803; M.V. Polak, 'Case note on HR 2 december 2011', *NJ* 2012/128, para. 6.2. (*Roucar Gear Techn/4Stroke*).

67 *St. Paul Dairy* case, para. 24 (*supra* n. 63). This is typical for the Dutch style of preliminary hearings of witnesses, whereas the laws of several other EU Member States do not provide for this possibility. In Germany a party can request a *selbständige Beweisverfahren* on the basis of § 485 of the German Code of Civil Procedure. Considering that it can only be used for clarifying the facts of the case if the opposing party agrees, it is never used for assessing the chances of success in practice. See E.F. Groot, *Het voorlopige getuigenverhoor*, Deventer: Wolters Kluwer 2015, at no. 50. In England and Wales, parties can assess their chances of success during the pre-trial disclosure stage of the proceedings when they have to share written documents upon the request of the opposing party. Witness depositions can, however, only take place under English law prior to the trial for preserving the witness testimony, see *ibid.*, no. 61, referring to *Barrat v. Shaw & Ashton* [2001] EWCA Civ 137. See in particular para. 13 of this judgment. In France, Art. 145 of the Code of Civil Procedure provides parties with the possibility to ask for a *mesure d'instruction in futurum*, but it seems that in practice this is never used for obtaining the testimony of an unwilling witness prior to the trial, see Groot 2015, *supra*, nos. 70-71.

68 *St. Paul Dairy* case, para. 17 (*supra* n. 63).

69 Pertegás Sender and Garber 2016 (*supra* n. 66), pp. 801-802; Besso 2012 (*supra* n. 34), p. 82; Nuyts 2007 (*supra* n. 8), p. 65. E.g. when the witness has a limited life expectancy or is expected to leave to a country that prohibits the disclosure of the requested evidence. Cf. Jansen 2019 (*supra* n. 13), p. 18.

70 See in this respect also the *forum necessitatis* ground for jurisdiction, described in Jansen 2019 (*supra* n. 13), p. 20; L.R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press 2014, pp. 105-108.

of the parties involved, and that the court without subject-matter jurisdiction keeps the evidence undisclosed until the forum court requests it to reveal the evidence obtained.<sup>71</sup>

## **5. Appraisal of the proposed Evidence Regulation (recast)**

### *5.1 The process that led to a proposal for the Evidence Regulation (recast)*

At the end of May 2018 the Commission published its proposal for the Evidence Regulation (recast).<sup>72</sup> It did so after a long process of evaluation, which started with the publication of its first report on the operation of the Evidence Regulation in December 2007.<sup>73</sup> Thereafter, the Commission published two additional reports<sup>74</sup> on the operation of the direct method (in 2012)<sup>75</sup> and the laws of evidence of the EU Member States (in 2016).<sup>76</sup> At the same time, several evaluative meetings took place and both a questionnaire as well as public consultation were conducted on the operation of the Regulation.<sup>77</sup> After the EU Commission announced in its EU Justice Agenda for 2020 that it would examine whether the parties' procedural rights had to be better protected in the field of evidence-taking,<sup>78</sup> it communicated its plan to revise the Evidence Regulation in its Work Programme of 2018.<sup>79</sup>

Ireland has informed the Council that it wants to take part in the revision of the Evidence Regulation.<sup>80</sup> The United Kingdom has refrained from doing so,<sup>81</sup> whilst Denmark has not

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71 Jansen 2019 (*supra* n. 13), p. 18.

72 Proposal COM(2018) 378 final of 31 May 2018. See for a previous discussion, O.L. Knöfel, 'Der Kommissionsvorschlag von 2018 zur Änderung der Europäischen Beweisaufnahmeverordnung', *RIW* 2018, pp. 712-718.

73 Report COM(2007) 769 final of 5 December 2007. This report was published on the basis of Art. 23 of the Evidence Regulation.

74 Following its Action Plan for Implementing the Stockholm Programme, see COM(2010) 171 final of 20 April 2010, p. 22.

75 *Study on the application of Articles 3(1)(C) and 3, and Articles 17 and 18 of the Council Regulation (EC) No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*, conducted for the European Commission, 20 June 2012, accessible via [http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/12/final\\_report\\_1206\\_en.pdf](http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/12/final_report_1206_en.pdf).

76 V. Rijavec, T. Keresteš and T. Ivanc (eds.), *Dimensions of evidence in European civil procedure*, Alphen aan den Rijn: Wolters Kluwer 2016. See also the website of the University of Maribor on which the project results can be found, <https://pf.um.si/en/acj/projects/pr01/>.

77 See Working document SWD(2018) 285 final of 31 May 2018, pp. 5-7.

78 Communication COM(2014) 144 final of 11 March 2014, para. 4.3.

79 Communication COM(2017) 650 final of 24 October 2017, Annex 2, point 11.

80 See 2018/0203 (COD), ST 13305 2018.

81 See 2018/0203 (COD), ST 14601 2019 INIT, Recital 9. The United Kingdom, however, does take part in the revision of the Service Regulation of 2007 (Proposal COM(2018) 379 final of 31 May 2018), see 2018/0203 (COD), ST 9566 2019 INIT, sect. 7. For the opt-in itself, see 2018/0204 (COD), ST 13622 2018 INIT.

taken any action for adopting an agreement with the EU on the basis of which the recast would apply to its courts.<sup>82</sup>

## 5.2 *The proposed amendments*

Throughout the evaluation process the Commission was advised to increase the use of technology under the Evidence Regulation (recast).<sup>83</sup> The Commission therefore first suggests to compel the courts of the EU Member States to communicate digitally amongst each other.<sup>84</sup> Accordingly, other – conventional – channels of communication may only be used when this digital system is corrupted or the evidence cannot be transferred digitally due to its nature.<sup>85</sup> In that way, the Commission expects to increase the efficiency and speed of the Regulation's procedures. It also believes that this will prevent additional delays and costs for EU citizens and businesses,<sup>86</sup> and that it will remedy shortcomings in the protection of procedural rights (in particular access to justice).<sup>87</sup>

Second, the Commission wants to enlarge the use of videoconferencing for the same reasons.<sup>88</sup> On the basis of the proposed Article 17a(1) a court must therefore make use of videoconferencing if it wants to take evidence directly within another Member State.<sup>89</sup> The Commission also expects to reduce costs for citizens and businesses, whilst simultaneously limiting the number of cases in which electronic evidence is rejected, by prohibiting courts from refusing the admissibility of evidence on the basis of its digital nature only.<sup>90</sup> Furthermore, it suggests to enable courts to request for the application of means of compulsion under the direct method, seeing that it proposes to remove the current Article 17(2).<sup>91</sup>

Third, the Commission expects to remove legal uncertainties by proposing the following definition of the term 'court': 'any judicial authority in a Member State which is competent for the performance of taking of evidence according to this Regulation'.<sup>92</sup>

Finally, the Commission proposes to create a detailed monitoring programme, on the basis of which the operation of the Evidence Regulation (recast) can be examined.<sup>93</sup> It also wants to

82 Cf. the agreement between Denmark and the EU as regards to the application of the Brussels I-bis Regulation, *OJ* 2013, L 79/4.

83 See e.g. Resolution P7\_TA(2010)0426 of 23 November 2010, para. 18; Resolution P6\_TA(2009)0089 of 10 March 2009, para. 4; para. 5 of the Questionnaire on videoconferencing, in Note 15641/07 ADD 2 of 12 December 2007 (referring to 10509/07 JURINFO 23 JAI 301 JUSTCIV 163COPEN 89).

84 Proposal COM(2018) 378 final of 31 May 2018, p. 8. See also the proposed revised version of Art. 6 of the Regulation.

85 Ibid.

86 Ibid., pp. 2 and 4.

87 Ibid., p. 6.

88 See *ibid.* and the proposed Art. 17a.

89 This provision thereby notes that this digital tool must be available to both the requesting and the requested court, and the use of videoconferencing must be appropriate according to the requesting court in light of the case at hand.

90 Proposal COM(2018) 378 final of 31 May 2018, pp. 6 and 8.

91 Ibid., p. 12.

92 Ibid., p. 8 and the proposed Art. 1(4).

93 Proposal COM(2018) 378 final of 31 May 2018, pp. 7-8 and the proposed Art. 22a.

enable diplomatic officers and consular agents to take evidence in another EU Member State from the nationals of the state they represent.<sup>94</sup> Following this proposed second direct method, diplomats and consular officials may do so without having to ask for prior approval from the central body (or authority) of the state where the evidence is taken, provided that the evidence is taken voluntarily. Accordingly, the different evidence-taking methods under the Evidence Regulation (recast) would be threefold, as illustrated by the following diagram.

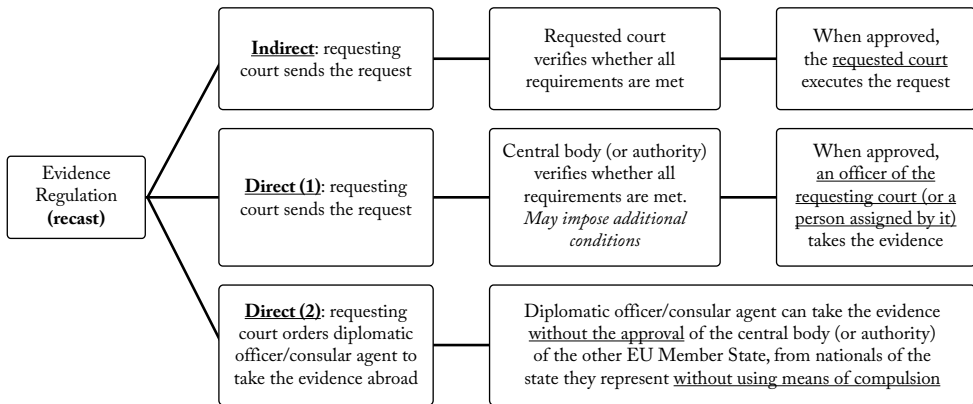


Fig. 5: Three evidence-taking methods under the Evidence Regulation (recast)

### 5.3 Some issues remain undiscussed

In its proposal the Commission does not address all the identified issues that have emerged in reports and scholarly contributions on the operation of the Evidence Regulation. First, the Commission wants to remedy the uncertainty that exists regarding the (non-)exclusive nature of the Regulation,<sup>95</sup> but it fails to propose a recital or provision thereon. At the same time one can wonder whether this is truly necessary, because forum courts seem to prefer using the *lex fori* for taking evidence from or within another Member State. These courts only seek to make use of the Regulation's methods when these methods are more efficient than using the *lex fori*.<sup>96</sup> In that sense, courts of the EU Member States use the Evidence Regulation as an additional tool, which is used when the taking of evidence *within* another Member State on the basis of the *lex fori* is impossible or less efficient.<sup>97</sup>

Second, the Commission refrains from proposing the use of a single language in which courts can make a request under the Regulation. Studies that were conducted on the operation of the Evidence Regulation suggested to examine the use of a single language, in order to

94 Proposal COM(2018) 378 final of 31 May 2018, p. 8 and the proposed Art. 17b. This method could then only be used in light of proceedings that have already begun.

95 Working document SWD(2018) 285 final of 31 May 2018, pp. 43 and 50.

96 Ibid., pp. 50-51. Cf. Hess et al. 2017 (*supra* n. 47), p. 114; Advocate General Jääskinen, opinion in C-170/11, *Lippens*, paras. 46-47.

97 Cf. Rijavec and Galič 2016 (*supra* n. 18), p. 374; Thole 2014 (*supra* n. 7), p. 257, who wonder whether the CJEU has not made the use of the Evidence Regulation in most cases redundant.

reduce the costs and simplify its procedures.<sup>98</sup> These studies also noted that, even though the prescribed forms of the Regulation have harmonized the information requirements and contain standardised phrases for which no translations or foreign language skills are needed,<sup>99</sup> language issues continue to exist.<sup>100</sup> It could be that the Commission refrained from proposing the use of English as an additional possibility<sup>101</sup> since not all courts have sufficiently mastered this language.<sup>102</sup> Such a provision would otherwise compel judges to communicate on complicated issues in English, which might reduce the reliability of inter-court communications.<sup>103</sup>

#### 5.4 Critical assessment of the proposed amendments

Comments can also be made regarding the amendments that the Commission has proposed. First, apart from the fact that the Commission's proposal only seems to allow videoconferencing 'in the premises of a court',<sup>104</sup> the Commission fails to clarify whether courts must automatically refuse requests that are not sent digitally. This should, in my opinion, not be advocated. Delaying or refusing to execute a request – that is content-wise in order – on this basis would conflict with the Regulation's aims of improving judicial cooperation between the Member States and enhancing access to justice for EU citizens and businesses. I furthermore wonder whether a default digital communication channel will effectively prevent delays in the execution of a request, which is a problem that was noted in the Commission's report of 2007.<sup>105</sup> It might be that these delays are caused by a substantial backlog of cases at the requested courts. If so, a default digital system of communications would not make a difference.<sup>106</sup>

98 See Mainstrat, *Study on the application of Council Regulation (EC) N°1206/2001, on cooperation between the courts of the Member states in the taking of evidence in civil or commercial*, p. 63, accessible via [http://ec.europa.eu/civiljustice/publications/docs/final\\_report\\_ec\\_1206\\_2001\\_a\\_09032007.pdf](http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf).

99 A. Stadler, 'Practical Obstacles in Cross-Border Litigation and Communication between EU Courts', *Erasmus Law Review* 2012, p. 164.

100 Working document SWD(2018) 285 final of 31 May 2018, p. 10; Rijavec and Galič 2016 (*supra* n. 18), p. 385: the quality of interpreters and translators is sometimes low.

101 In favour: Rijavec and Galič 2016 (*supra* n. 18), p. 385; EU MainStrat report (*supra* n. 98), p. 62.

102 Hess et al. 2017 (*supra* n. 47), p. 116; Stadler 2012 (*supra* n. 99), p. 164.

103 See Stadler 2012 (*supra* n. 99), pp. 164–165 and 167. This author suggests that the Member States must create translation services instead.

104 See the proposed Art. 17a(2). Cf. Knöfel 2018 (*supra* n. 72), p. 715, who criticizes this provision for excluding other locations in which videoconferences can be held, such as diplomatic premises, law firms or hotels. To the contrary, the Council proposes to enable 'the taking of evidence via videoconference or other communication technology' at other locations as well. See 2018/0203 (COD), ST 14601 2019 INIT, p. 17 (the proposed Art. 17a(2)).

105 Report COM(2007) 769 final of 5 December 2007, para. 2.1.

106 Cf. Rijavec and Galič 2016 (*supra* n. 18), p. 388, G. Payan, 'Quel bilan pour le Règlement (CE) no. 1206/2001 du Conseil du 28 mai 2001 sur l'obtention des preuves en matière civile ou commerciale?', in: M. Douchy-Oudot and E. Guinchard, *La justice civile européenne en marche*, Paris: Dalloz 2012, p. 107, at p. 117 and J.M. Hebly, 'Drie stellingen over internationale bewijsgeving', in: M. Herrebout, *Grensgevalen: Grensgevalen, Bundel ter gelegenheid van het Jonge Balie Congres*, Deventer: W.E.J. Tjeenk Willink 1996, p. 137, at p. 140.



Second, the Commission wants to remedy shortcomings in the protection of procedural rights, whereas it simultaneously refrains from better protecting these rights under the Regulation's grounds for refusal. In contrast with the Evidence Convention,<sup>107</sup> a person from whom evidence is sought cannot invoke a privilege or a duty to refuse to give evidence under the laws of a third state.<sup>108</sup> The German proposal did not explain why this possibility was excluded and neither the EU Parliament nor the Economic and Social Committee touched upon this issue. Seeing that the protection of privileged information is essential in the area of freedom, security and justice<sup>109</sup> and differences in domestic privilege laws<sup>110</sup> can stimulate forum shopping,<sup>111</sup> the Commission should examine whether this ground for refusal must be altered under the recast.<sup>112</sup> It must also examine whether courts can be compelled to use the Evidence Regulation (recast) if a person invokes a privilege or a duty to refuse to give evidence, either under the laws of the requested state or a third state.<sup>113</sup> In light of the CJEU's judgment in *ProRail*, a denial to apply such privileges or duties – whilst evidence is taken abroad under the *lex fori* – might affect the powers of another Member State.

Furthermore, the Commission should limit the scope of Article 17(5)(c)'s ground for refusal to those cases which are *manifestly contrary* to the public policy of the Member State where the evidence must be taken,<sup>114</sup> in line with Article 45 of the Brussels I-bis Regulation. Possibly the Commission believed this was too difficult<sup>115</sup> or inappropriate.<sup>116</sup> In my opinion, however, there is no need for a broadly formulated public policy-based ground for refusal under the Evidence Regulation (recast). The central bodies or competent authorities can always condition the direct

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107 See its Art. 14(2).

108 Cf. Van het Kaar 2008 (*supra* n. 28), p. 189, who believes that this is a disappointing retrograde step.

109 See B.J. van het Kaar, 'De Europese Bewijsverordening wordt op 1 januari 2004 van kracht', *NTER* 2003, p. 287, at p. 290. Cf. Resolution 2015/2084(INL) of 4 July 2017, Art. 10: 'Member States shall ensure that effective means of presenting, obtaining and preserving evidence are available having regard to the rights of defence and the need to protection of confidential information.' See also Resolution TA/2019/0103 of 13 February 2019, Amendment 24: the EU Parliament requests the Commission to ensure that professional secrecy and legal professional privilege are protected under the electronic systems for taking evidence.

110 Van het Kaar 2008 (*supra* n. 28), p. 189.

111 E. Storskrubb, *Civil procedure and EU law: a policy area uncovered*, Oxford/New York: Oxford University Press 2008, p. 131.

112 Cf. Van het Kaar 2008 (*supra* n. 28), p. 181; Van het Kaar 2003 (*supra* n. 109), p. 291.

113 Cf. Nuyts 2007 (*supra* n. 8), pp. 78-79, who holds: '[O]n peut penser que certaines mesures, même lorsqu'elles visent des parties au litige, emportent des effets tellement prononcés pour les justiciables qui en sont l'objet qu'il paraît difficile d'admettre qu'elles soient mises en œuvre de manière systématique autrement que par les voies de l'entraide judiciaire organisées par le règlement'.

114 Cf. Storskrubb 2008 (*supra* n. 111), p. 129; Van het Kaar 2008 (*supra* n. 28), p. 189.

115 Cf. M. Hazelhorst, 'Mutual Trust Under Pressure: Civil Justice Cooperation in the EU and the Rule of Law', *NILR* 2018, p. 103; E. Storskrubb, 'Mutual Trust and the Dark Horse of Civil Justice', *Cambridge Yearbook of European Legal Studies* (20) 2018, pp. 179-201; Kruger 2016 (*supra* n. 7), sect. 1, who all note that the principle of mutual trust is under pressure nowadays.

116 See for a discussion of the failed attempt to remove this ground for refusal under the Brussels I-bis Regulation, Hazelhorst 2018 (*supra* n. 115), p. 111; X.E. Kramer, 'Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights', *NILR* 2013, p. 343, at pp. 353-354.

evidence-taking in order to prevent a violation of their state's public policy. Moreover, these bodies and authorities may always refuse to approve the execution of a request that would lead to a flagrant violation of the right to a fair trial, irrespective of the existence of a ground for refusal.<sup>117</sup>

Third, the Commission wants to remove legal uncertainties under the Evidence Regulation by incorporating a definition of the term 'court'. Nevertheless, it does not propose definitions of the terms 'evidence'<sup>118</sup> and 'civil or commercial matters',<sup>119</sup> even though courts also face difficulties in defining these terms. A definition of these terms therefore also seems to be needed. Moreover, the Economic and Social Committee and the Parliament have noted that the proposed definition of the term court is too limited, because it excludes arbitral tribunals<sup>120</sup> – that deal with many cross-border disputes and therefore play an essential role in providing access to justice – from its scope.<sup>121</sup> The Council seems to have taken note of these comments, seeing that it has recently proposed to adopt a broader definition of the term 'court'.<sup>122</sup> Furthermore, the Commission's proposal to delete Article 17(2), which will enable courts to request for the use of means of compulsion under the direct method, should be welcomed in light of the aim of remedying legal uncertainties as well. Presumably adopting an explicit provision thereon is even more desirable, seeing that the fact that means of compulsion currently cannot be used under the direct method is one of the main reasons why this method is little used in practice.<sup>123</sup>

At the same time, however, the Council tries to limit the use of means of compulsion under the direct method. First, it noted that such measures should only be used in exceptional cases.<sup>124</sup> In its recent proposal, it underlines that the direct method can only be used voluntarily, even though '[t]he central body or the competent authority may assign a court of its Member State to provide practical assistance in the taking of evidence'.<sup>125</sup> It is thereby not clear whether such

117 Storskrubb 2018 (*supra* n. 115), sect. IV(c), referring to ECtHR 23 May 2016, Appl. No. 17502/07 (*Avotiņš v. Latvia*). For a discussion of examples of flagrant and non-flagrant violations, see Hazelhorst 2018 (*supra* n. 115), sects. 5.1-5.2.

118 Report COM(2007) 769 final of 5 December 2007, sect. 2.4.

119 Working document SWD(2018) 285 final of 31 May 2018, pp. 9, 16 and 39.

120 This is in line with many other EU Regulations, see Kruger 2016 (*supra* n. 7), sect. 2.3.

121 Resolution TA/2019/0103 of 13 February 2019, Amendment 2 and 14 and Opinion EESC 2018/03992-AS of 17 October 2018, para. 5.3. At the same time, however, excluding arbitral tribunals from the recast's scope will not have severe implications for the taking of evidence during arbitral proceedings, when the internal laws of the EU Member States enable these tribunals to work around the recast. See *infra* n. 35.

122 See 2018/0203 (COD), ST 14601 2019 INIT, p. 14: 'The term "court" means courts and other authorities in Member States as notified under the third subparagraph of Article 22 exercising judicial functions or acting pursuant to a delegation of power by a judicial authority or acting under the control of a judicial authority which, according to national law, are competent to take evidence for the purposes of judicial proceedings in civil and commercial matters'.

123 Knöfel 2018 (*supra* n. 72), pp. 715-716; Rijavec and Galič 2016 (*supra* n. 18), p. 387; Advocate General Jääskinen, opinion in C-170/11, *Lippens*, para. 58; Besso 2012 (*supra* n. 34), p. 74; Payan 2012 (*supra* n. 106), p. 115.

124 2018/0203 (COD), ST 10773 2019 INIT, pp. 4-5: The Council proposed to maintain Art. 17(2) and to adopt Art. 17(4) instead, which would hold that '[b]y way of exception to paragraph 2, the court assigned to assist the requesting court may apply Article 13 [on the use of means of compulsion; *RJ*] accordingly' (emphasis added; *RJ*).

125 2018/0203 (COD), ST 14601 2019 INIT, p. 16.

‘practical assistance’ includes the use of means of compulsion. Another interesting question is whether the proposed recast should contain a provision that prohibits courts from denying the admissibility of a piece of evidence solely due to its digital nature.<sup>126</sup>

Finally, the Commission proposes to adopt an explicit provision on the taking of evidence by diplomatic officers and consular agents, from the nationals of the state they represent, on the territory of another Member State. Even though the Evidence Regulation currently does not contain such a provision,<sup>127</sup> it is clear that diplomats and consular officials can be assigned to take the required evidence under Article 17.<sup>128</sup> The added value of the introduction of this third method is thus limited,<sup>129</sup> also in light of the CJEU’s judgment in *ProRail*. Nevertheless, at the same time the Council is also in favour of adopting an explicit provision thereon under the recast.<sup>130</sup>

## 6. Conclusion

In this article I have described different ways for taking evidence in another EU Member State during civil litigation. I have touched upon the – in principle – non-mandatory nature of the Evidence Regulation and the possibility for the forum court to order the taking of evidence in another Member State on the basis of the *lex fori*. Herein, I have explained which methods courts can use under the Evidence Regulation and how this relates to Article 35 of the Brussels I-bis Regulation.

In the final part of this article, I have discussed the Commission’s proposal for the Evidence Regulation (recast), in which it suggests making electronic communications between the courts of the EU Member States compulsory and to enhance the use of modern technologies. I also touched upon several issues that the Commission does not address. Finally, I have explained whether the Commission’s proposal for the Evidence Regulation (recast) will remedy all the identified issues regarding the present operation of the Evidence Regulation.

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126 When this provision is adopted, it would mean that a digital piece of evidence – that is obtained on the basis of the recast – cannot be declared inadmissible solely on the basis of its digital nature, whereas the same piece of evidence can be excluded as admissible evidence on this ground if it is taken by using another method. See also Knöfel 2018 (*supra* n. 72), p. 718, who argues that rules on the admissibility of evidence are a matter of national procedural law only. The last-mentioned criticism seems to have been recently taken into account by the Council, see 2018/0203 (COD), ST 14601 2019 INIT, Recital 4.

127 A separate provision existed under the original, German proposal for adopting the Evidence Regulation (*OJ* 2000, C 314/1), see its Art. 19(2).

128 Besso 2012 (*supra* n. 34), p. 74; Storskrubb 2008 (*supra* n. 111), p. 120.

129 Cf. Knöfel 2018 (*supra* n. 72), pp. 716-717, who claims that the taking of evidence abroad by consular officials is not a frequently used method within the EU. But see Working document SWD/2018/285 final of 31 May 2018, p. 16, which speaks of ‘[f]requently used channels’.

130 See 2018/0203 (COD), ST 14601 2019 INIT, Recital 7 and p. 18.